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September 29, 2011

Marlene H. Dortch
Federal Communications Commission Secretary
Office of the Secretary
Federal Communications Commission
9300 East Hampton Drive
Capitol Heights, MD 20743

Reference: WC Docket No. 11-59

Dear Ms. Dortch:

Enclosed please find a joint reply submitted on behalf of the Cities of Chino Hills, Diamond Bar, El Segundo, Hermosa Beach, Lomita, Malibu, Monterey Park, Palos Verdes Estates, Rolling Hills, Santa Paula, and West Hollywood, California. I have included the original and the four required copies, as well as five additional copies to be distributed to the Commissioners. Please feel free to call me if you have any questions. Thank you.

Very truly yours,

Robert M. Smith

Enclosures

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Acceleration of Broadband Deployment:	)	WC Docket No. 11-59
Expanding the Reach and Reducing the Cost of	)	
Broadband Deployment by Improving Policies	)	
Regarding Public Rights of Way and Wireless	)	
Facilities Siting	)	

JOINT COMMENTS OF THE CITIES OF CHINO HILLS, DIAMOND BAR, EL SEGUNDO, HERMOSA BEACH, LOMITA, MALIBU, MONTEREY PARK, PALOS VERDES ESTATES, ROLLING HILLS, SANTA PAULA, AND WEST HOLLYWOOD, CALIFORNIA

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I. INTRODUCTION AND SUMMARY

This comment letter is submitted on behalf of the Cities of Chino Hills, Diamond Bar, El Segundo, Hermosa Beach, Lomita, Malibu, Monterey Park, Palos Verdes Estates, Rolling Hills, Santa Paula and West Hollywood (collectively, "Cities"), all of which are located in Southern California. All of the Cities have established permitting processes for wireless and broadband facilities and have cumulatively approved over 150 wireless telecommunications facilities in the last five years. The Cities share the same goals and objectives as the Commission: to establish an efficient and manageable wireless and broadband telecommunications policy that meets the communication needs of City residents while maintaining a safe and aesthetically pleasing City environment. The Cities support the responsible development, planning and installment of wireless telecommunication facilities in their jurisdictions to ensure that City residents have good cellular service; however, such policies are best established on the local level, where Cities can respond to the particular needs and characteristics of their communities. Cities are best

positioned to balance these competing goals and manage the proliferation of wireless and broadband facilities.

While certain commentators requested that the Commission entirely exempt wireless and broadband telecommunications facilities from local regulation, such a policy would severely impact cities. Cities are extremely diverse, with different wireless and broadband needs, different land use patterns and community aesthetics, and different topography and environmental considerations that may impact communications services. What may be appropriate for Los Angeles or San Francisco may not be appropriate for Malibu. "One size fits all" federal regulation would decimate local control over aesthetics and safety. Such local control, done in an efficient and nondiscriminatory manner, results in improving wireless and broadband availability and service, without degrading community aesthetics or safety. Cities must retain authority to determine their own destinies when mitigating local impacts of proposed wireless facilities including, without limitation, aesthetic, land use and traffic safety impacts such facilities may have on the surrounding community.

Uniformity in rate regulations may be desirable in communication regulations. However, each city is unique in, among other things, topography, traffic flow, viewsheds, and climate. Consequently, using a cookie cutter approach for placement and approval of wireless and broadband facilities is unrealistic. Simply because a few communities, out of thousands, may require improvements in policies and procedures for approving wireless telecommunication facilities – for example, to eliminate bureaucracy, expedite application review, and generally eliminate inefficiencies in the process – this does not justify imposing uniform federal regulations for all cities. Rather, it constitutes a justification to improve local policies in those jurisdictions; not eliminate local control completely. Local agencies should continue to play the

"vital role" that they currently have in the process, as their constituents are the ones that will be most affected.

While the Commission has rulemaking authority to establish administrative procedures and rules pursuant to the Telecommunications Act ("TCA"), it does not have the authority to establish rules that contradict the express provisions and regulations of the TCA. This is precisely what certain commentators have requested of the Commission. Despite the fact that Sections 253 and 332 (the sections cited by the Commission for its rulemaking authority) expressly preserve the authority of local authorities to regulate public rights-of-way and "placement, construction, and modification of personal wireless service facilities," commentators have requested that wireless and broadband facilities be wholly exempt from regulation. This contradicts both the language and intent of the TCA. While the Commission has the authority to "remove barriers to infrastructure development" this does not mean the Commission can completely usurp the TCA's reservation of authority for local agencies to approve wireless and broadband facilities. Any such proposed amendment must be approved by Congress as an amendment to the TCA.

The Cities support the Commission's objective to guide local governments in establishing clearer and more consistent policies. As part of this process, the Cities would support circulation of a model ordinance or guidelines that could assist the Cities in improving their current policies (to the extent necessary) and keep current with changing telecommunications and broadband technologies. For example, the Cities would support policies that favor collocation on existing facilities that reduce the proliferation of sites throughout a particular jurisdiction and mitigate aesthetic impacts. The Cities also would support implementation of Distributed Antenna Systems ("DAS") to the extent that DAS systems can be integrated into street signs, telephone

poles and other existing City infrastructure. Several of the Cities already approved DAS systems with these types of modifications.

However, the Cities seek more transparency by telecommunications providers and infrastructure developers. Increased transparency is essential in establishing stronger and more predictable local regulations. Telecommunications providers and developers frequently submit applications proposing facility designs based solely on the cost of the facility and thereafter assert that modifications sought by the city to make the proposed facility more aesthetically integrated are not technologically or financially feasible. Facility design is changed only after persistent efforts by city representatives and community members, which can delay approval of such improvements. The Cities would welcome guidance from telecommunication providers, infrastructure developers, and the Commission as to what currently represents "best practices" in the industry, that would meet their technological requirements and financial investment while also respecting public safety and welfare in the host community.

Another major concern of the Cities is the piecemeal approval process for many of the applications. Many Cities face one application for one node at a time, even though an infrastructure provider may be planning tens (or hundreds) of nodes within a particular city or neighboring area. Regional planning for future installation of telecommunications and broadband facilities would not only assist the Cities in making sure that there will not be a cumulative aesthetic or safety impact, but would also permit them to ensure that their residents are obtaining quality wireless and broadband access and service.

The Cities appreciate the Commission's invitation to comment on this important issue and look forward to working with the Commission to ensure a fair, nondiscriminatory, and balanced approach towards deployment of wireless and broadband facilities.

II. BACKGROUND

The Cities submitting this joint comment letter represent a wide variety of interests in Southern California. Their demographics range from a population of approximately 1,900 residents (Rolling Hills) to over 75,000 (Chino Hills). The Cities are varied in community characteristics, land use plans, and aesthetics. For example, the City of West Hollywood is a primarily urban and suburban environment, with a substantial amount of the City dedicated to commercial uses, including restaurants, nightclubs, entertainment industry uses, and tourism attractions such as the Sunset Strip, which all contribute to generate a significant amount of tourism annually for the City. The City has a significant number of hills and tall buildings which may be used for placement of telecommunications and wireless facilities or may contribute to disrupting signals, depending on the location of existing facilities.

In contrast, the City of Palos Verdes Estates is a primarily suburban residential community with only two small areas of the City designated for commercial uses. There are no buildings over three stories in height and the City has strict requirements regarding residential landscaping and aesthetics. Most of the other Cities may be characterized as somewhere between these two examples.

The Cities have a strong history of assisting telecommunications companies and infrastructure developers in improving telecommunications and wireless service in their communities. Cumulatively, the Cities have approved over 150 approvals for installation of wireless, broadband and telecommunications facilities. Diamond Bar alone approved approximately 63 such facilities. While many of the Cities have different processes that fit the particular needs and characteristics of their communities, the result is the same – consistent and responsible improvement of telecommunications, wireless and broadband service in the area.

The table below summarizes the Cities' experience in reviewing and approving telecommunications, broadband and wireless approvals over the past five years.[1]

WIRELESS FACILITIES APPROVAL SUMMARY

City	# of Facilities Approved	# of Facilities Denied	DAS Facilities Approved	# of Facilities Under Consideration	Average Time for Decision[1]	Reasons for Denials
Chino Hills	34	0	19	10	4 months	N/A
Diamond Bar	63	1	7	2	6 months	No evidence of lack of coverage; other collocation sites available
El Segundo	16	0	0	4	5 months	N/A
Monterey Park	12	2	0	0	3 months	Proposed development would disturb sensitive wildlife in the area; would limit expansion of existing water facilities
Palos Verdes Estates	8	5	0	3	7 months	Aesthetic concerns; issues regarding height of proposed structure and proximity to the street; no evidence of lack of coverage; other available alternative less impactful site
Rolling Hills	17	0	0	0	1-3 weeks	N/A
Santa Paula	3	1	0	1	3 months	Obstructed access to water utility facility
TOTAL	153	9	26	20	4 months (avg)	

[1] Includes time required for developer to revise plans and application to meet City regulations and guidelines

As shown on the table, over 94 percent of all proposed wireless telecommunications facilities were approved by the Cities in the last five years. Most facilities were approved within four to five months. The few applications that were denied were rejected for objective and non-discriminatory reasons, most of which involved the particular site selected for the facility. Such reasons include (1) other collocation sites were available; (2) the proposed facility obstructed other existing facilities; (3) the proposed facility was designed and located in an area that

[1] The Table only represents some of the Cities. The Cities not included in the table were exempted due to difficulties obtaining accurate information regarding the total number of facilities reviewed and/or approved within the last five years.

resulted in significant aesthetic impacts; or (4) there was no evidence of a need for coverage in the proposed area. This record indisputably establishes that there is no need for further regulation in this area, and that some of the comments received depict "individual or anecdotal situations" rather than a systematic practice to deny or delay wireless facility applications.[2] Further, the average time to review an application falls within the acceptable time limits established by the Commission for review and approval of wireless facilities.[3] The time required for such review would be further expedited upon implementation of the recommendations described in Section V, below, and improved understanding by applicants regarding the specific requirements of a particular jurisdiction.

III. LOCAL AGENCIES SHOULD RETAIN AUTHORITY TO APPROVE WIRELESS AND BROADBAND FACILITIES

The Commission requested that government entities explain the policy goals underlying their current practices regarding rights-of-way and approval of wireless facilities.[4] The primary goals for Cities' policies regarding rights-of-way and approval of wireless facilities are local land use planning identifying the best use of the Cities' public rights-of-way; improved aesthetics; and traffic safety. These are matters best resolved by the local community – since they vary from city to city - and cannot be satisfactorily regulated by the Commission on a nationwide basis.

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[2] Federal Communications Commission Notice of Inquiry ("NOI"), April 7, 2011, at ¶8

[3] *Petition for Declaratory Ruling to Clarify Provisions of Section 332(C)(7)(B) to Ensure Timely Siting Review and To Preempt Under Section 253 State and Local Ordinances That Classify All Wireless Siting Proposals as Requiring a Variance* (2009) WT Docket N. 08-165, Declaratory Ruling, 24 FCC Rcd 13994 (permitting 150 days to review a wireless application).

[4] NOI at ¶¶ 9, 22.

A. Land Use Policies and Use of Rights-of-Way

As noted by the Commission, since the adoption of the TCA, cities and local agencies have played a "vital role"[5] in balancing the needs of telecommunications and broadband companies with the desires of their residents and the character of the community. The TCA itself "seeks to preserve the authority of the State and local governments over zoning and land use matters."[6] Part of this authority is a city's right to exercise reasonable control as the owners of public rights-of-way in its jurisdiction as to the time, place and manner in which roads, highways, and waterways are used.[7]

"It is a widely accepted principle of urban planning that streets may be employed to serve important social, expressive and aesthetic functions."[8] This urban planning process includes planning future street improvements and street widening, installing landscaping within medians and public rights-of-way, and obtaining revenue from other uses that may be installed in the public right-of-way. Traditionally, cities have authority (subject to certain state and federal restrictions) to determine the best use of the public right-of-way within their jurisdiction. These rights of self-governance may be frustrated by careless installation of wireless and broadband facilities that are not evaluated as part of a city's land use entitlement processes. There are a variety of reasons that cities may not want to approve certain telecommunications and wireless facilities within the public right-of-way, including (1) a desire to maintain the aesthetic appearance of the public right-of-way; (2) ensuring that the facility does not interfere with the

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[5] *Id.* at ¶ 6.

[6] *Sprint PCS Assets, LLC v. City of Palos Verdes Estates* (9th Cir. 2009) 583 F.3d 716, 721; *Petition for Declaratory Ruling To Clarify Provisions of Section 332(C)(7)(B) To Ensure Timely Siting Review and To Preempt Under Section 253 State and Local Ordinances That Classify All Wireless Siting Proposals as Requesting a Variance* ("FCC Section 332 Declaratory Ruling") (2009) WT Docket No. 08-165, Declaratory Ruling, 24 FCC Rcd 13994, at ¶ 3 ("While Section 332(c)(7) of the Communications Act preserves the authority of State and local governments with respect to such approvals, Section 332(c)(7) also limits State and local authority, thereby protecting core local and State government zoning functions while fostering buildout").

[7] *City of Palos Verdes Estates*, 583 F.3d at 721.

[8] *Id.* at 723.

city's investment and maintenance of the right-of-way; (3) to minimize disruption to traffic patterns; and (4) concerns regarding a particular company that has a poor service history or is unlikely to honor its compensation commitments.

Where cities have permitted telecommunication and wireless facilities in the public right-of-way, most have sought compensation permitted under the TCA for the right to such use. This compensation is particularly important in today's distressed economic climate, where cities are attempting to balance budgets with decreasing revenue streams, increasing pension demands, and greater demands from state governments. Cities need to retain the right to determine the best way to use their public rights-of-way, whether the best use is for wireless facilities, other means of revenue production, or simply maintaining the public right-of-ways as an attractive and aesthetically pleasing thoroughfare through the city.[9] This decision will likely depend on the particular characteristics of the city and cannot be properly considered in a "one size fits all" approach.

Several Cities have implemented policies that effectively maintain consistency with the city's land use plan and zoning requirements including without limitation:

- Restricting the height of proposed wireless facilities to that permitted in the zone where the proposed facility is located;
- Requiring consideration of alternative sites to ensure that the proposed site is the most compatible with the city's land use plan and surrounding neighborhood; and
- Permitting an expedited review (approved by the Planning Department rather than the Planning Commission) if the proposed facility is located in a zone that is not designated residential or open space.

[9] This need is recognized in the Commission's National Broadband Plan, where it notes that states and local municipalities should remain free to enforce standards that are not inconsistent with federal law. Federal Communications Commission, National Broadband Plan, at 130.

B. Aesthetics and Property Values

One of the primary complaints that Cities receive regarding wireless and broadband applications is the aesthetic and view impact the facilities would have on the neighborhood and associated impacts to property values. As noted by one court:

> The experience of traveling along a picturesque street is different from the experience of traveling through the shadows of a [wireless communications facility], and we see nothing exceptional in the City's determination that the former is less discomforting, less troubling, less annoying and less distressing than the latter. After all, travel is often as much about the journey as it is about the destination.[10]

While some commentators have requested that wireless communications facilities be exempt from local aesthetic review, a municipality's right to regulate aesthetics is a constitutionally protected and legitimate exercise of its police power.[11] Cities frequently rely on mitigation measures and conditions to address issues related to views, aesthetic appearance and neighborhood compatibility to ensure that a particular facility is appropriate for a particular location. Other courts similarly found that wireless and broadband facilities can cause significant degradation in property values.[12]

The Cities acknowledge that the wireless telecommunications industry has improved wireless technology to mitigate aesthetic impacts. Unlike older 150 foot telecommunications towers, DAS networks properly integrated into the existing community design can provide a model compromise that reduces the facility's impact on aesthetics and property values while improving wireless and broadband service. However, the Cities frequently find that the first proposed design for a facility (which would likely be the design used if the facilities were exempted from City regulation) places greater emphasis on cost rather than the community's

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[10] *City of Palos Verdes Estates*, 583 F.3d at 723.
[11] *Id.* at 722; *Metromedia, Inc. v. City of San Diego* (1981) 453 U.S. 490.
[12] *Vertex Develop., LLC v. Manatee County* (M.D. Fla. 2011), 761 F.Supp.2d 1348; Congressional Research Service (Sept. 4, 2008) "The Siting of Wireless Communications Facilities: An Overview of Federal, State and Local Law".

aesthetic concerns. Certain wireless telecommunication providers and infrastructure developers agreed to install a facility that minimizes the view and aesthetic impacts to the community only after significant time and resources are invested into negotiations with the city. One way to mitigate this issue is working to design model DAS facilities that are integrated into existing utility poles, streets signs, or other existing infrastructure to minimize the visibility of new facilities and reduce view impacts to the community.

Several Cities implemented policies that are effective in mitigating aesthetic impacts, including without limitation:

- Encouraging collocation of facilities when feasible;
- Requiring the base station and all wires and cables to be installed underground if feasible;
- Encouraging innovative designs which blend into existing right-of-way infrastructure, including designs which use existing street signs, traffic signs, and telephone poles; and
- Requiring landscaping to block views of the facility.

C. Traffic Safety

The Cities' primary concern and responsibility as owner of public rights of way within their jurisdictions is to ensure that public rights of way, streets and highways are safe, efficient and attractive thoroughfares. A key concern for Cities when evaluating any installation, encroachment or construction within the public right of way is whether the proposed project would interfere with traffic or create a traffic hazard. Wireless telecommunications facilities can create a traffic hazard if improperly placed since they can reduce visibility near corners and intersections, block visibility of traffic signs, and distract motorists. Installing permanent facilities in the public right-of-way also limits a city's ability in the future to widen the roadway if needed to improve traffic flow. Exempting wireless telecommunications facilities from local regulation would increase the possibility that such facilities would create a traffic hazard and

increase the potential for accidents. Cities must retain the authority to review facility applications to make sure that the proposed facility does not create a traffic hazard.

D. Uniformity

The Commission requested comment regarding whether it should work to "increase uniformity in rights of way and wireless facilities siting governance among localities and/or within the federal government."[13] The Cities' answer to this is a resounding "NO." As noted elsewhere, uniformity may make sense for rates and fee structures. However, imposing uniform regulations affecting local concerns is impractical and imprecise. The type of regulation that may be most effective in Tulsa, Oklahoma may not be appropriate in Malibu, California. Indeed, even neighboring cities (such as the cities of Los Angeles and Santa Monica) could have very different objectives, demands and concerns regarding the placement of telecommunication facilities. Different cities have widely diverse land use patterns, demographics, topography, right-of-way policies, and population and development density, all of which may affect policies regulating wireless telecommunications and broadband facilities. Because of this, Congress reserved primary responsibility for regulating the siting of wireless facilities for local governments (as discussed in greater detail below).

Uniform regulation may benefit the telecommunications industry. But it would drastically impact local communities' ability to self-govern. For example, regulation as to the maximum (or minimum) height permitted for a telecommunications facility subject to administrative approval would be unworkable if imposed on both the City of Los Angeles (with buildings over 100 stories) and the City of Palos Verdes Estates (which has no building over 3 stories). Local regulations are different from jurisdiction to jurisdiction because those jurisdictions themselves are inherently different. While the Cities support model guidelines and

[13] NOI, at ¶ 39.

any effort by the Commission to publish local "best practices" that may be implemented by local governments to increase uniformity, it does not make sense to increase federal regulation in this area when local governments remain in the best position to balance the need for high quality telecommunications facilities with the concerns and needs of the local community.

IV. THE FCC DOES NOT HAVE THE AUTHORITY UNDER THE TCA OR OTHER FEDERAL STATUTES TO RESTRICT LOCAL REVIEW AND APPROVAL OF WIRELESS TELECOMMUNICATIONS AND BROADBAND FACILITIES

The Commission requested comment concerning whether it has the authority to adopt rules "further defining when a state or local legal requirement constitutes an effective barrier to the provision of a telecommunications service under section 253(a)."[14] Certain commentators also requested that the Commission exempt wireless and broadband facilities entirely from local regulation.[15] Pursuant to the TCA and Broadband Data Improvement Act, the Commission does not have the authority to regulate in this area, as the above Acts explicitly preserve local agencies' right to regulate and approve wireless telecommunications and broadband facilities, including those located within the public right-of-way. Any proposed regulation that contravenes this right would require an amendment to the existing statutes approved by Congress.[16]

A. The Plain Language of Relevant Statutes Clearly Preserves Local Authority to Regulate but Not Prohibit Wireless and Broadband Telecommunications Facilities

The historic police powers of states and local authorities are not superseded by federal law unless preemption is the clear and manifest purpose of Congress.[17]

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[14] NOI, at ¶ 57.
[15] *See, e.g.* Comments of Next G Networks, Inc., at 5 ("NextG's state-level regulatory status should exempt it from most local permitting schemes").
[16] 47 U.S.C. § 154(i) (providing that the Commission cannot make rules and regulations inconsistent with the TCA).
[17] *New York SMSA Limited Partnership v. Town of Clarkstown* (S.D. N.Y. 2009) 603 F.Supp.2d 715, 720; *National Ass'n of State Utility Consumer Advocates v. FCC* (11th Cir. 2006) 457 F.3d 1238, 1252.

> Federal regulation of a field of commerce should not be deemed preemptive of state [or local] regulatory power in the absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has so unmistakenably so ordained.[18]

Regarding the present proposed regulation, Congress *preserved* the rights of local agencies to regulate wireless telecommunications facilities including those proposed in public rights of way. Congress's intent is unambiguous and does not require additional clarification or regulation by the Commission.

Several provisions of the TCA preserve state and local authority to regulate and approve siting and design of wireless telecommunication and broadband facilities. Section 332, which provides the substantive provisions regulating wireless telecommunications facilities, provides that:

> Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.[19]

The Section provides four limitations on cities. Under Section 332, cities (1) cannot unreasonably discriminate between providers; (2) cannot prohibit or have the effect of prohibiting the provision of personal wireless services; (3) must act on any application within a reasonable period of time; and (4) must make its determination in writing supported by substantial evidence.[20] There are no other limitations on a local agency's authority to regulate wireless communications facilities pursuant to its established land use, building and safety regulations. Section 253 of the TCA provides similar language regarding a city's right to restrict telecommunications facilities in public rights-of-way:

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[18] *Id.* (quoting *Fla. Lime & Avocado Growers, Inc. v. Paul* (1963) 373 U.S. 132, 142.
[19] 47 U.S.C. §332(c)(7)(A).
[20] 47 U.S.C. §332(c)(7)(B).

> Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a completely neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.[21]

These provisions are unambiguous: Congress preserved the right of local governments to regulate wireless telecommunications facilities in the public right-of-way. Therefore, the Commission does not have the authority to establish regulations which impose additional restrictions beyond those listed in Section 332. The Committee has acknowledged this limitation in previous decisions.[22]

B. Congress Clearly Intended to Preserve Local Authority to Regulate Telecommunications Facilities

When an interpretation of the TCA:

> conflicts with and contradicts the congressional intent to largely preserve local authority as expressly manifested in the plain language of the statute, and where that interpretation would render the other substantive and procedural requirements of the statute largely superfluous, recourse to the legislative history to clarify congressional intent is appropriate.[23]

Congress did not intend for the TCA to completely preempt local zoning authority of wireless telecommunications facilities. Instead, Section 332 only prohibits general bans of personal wireless facilities, or policies which have the effect of banning personal wireless facilities.[24] Congress's intent was to "strike a balance between 'two competing aims – to facilitate nationally the growth of wireless telephone service and to maintain substantial local

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[21] 47 U.S.C. § 253(c).
[22] *See* FCC Section 332 Declaratory Ruling, at ¶ 25 ("We read the legislative history as intending to preclude the Commission from maintaining a rulemaking proceeding to impose *additional* limitations on the personal wireless facility siting process beyond those stated in Section 332(c)(7)").
[23] *Virginia Metronet, Inc. v. Board of Supervisors* (E.D. Va. 1998) 984 F.Supp.966, 971.
[24] *Id.*

control over the siting of towers."'[25] The 1996 House Conference Report explicitly prohibited Commission rulemaking restricting local regulation of telecommunication facilities:

> Any pending Commission rulemaking concerning the preemption of local zoning authority over the placement, construction or modification of CMS [commercial mobile facilities] should be terminated.[26]

The 1996 Senate Conference Report similarly stated Congress's intent to protect local authority from FCC regulation:

> The conference agreement creates a new section 704 which prevents Commission preemption of local and State land use decisions and preserves the authority of State and local governments over zoning and land use matters except in the limited circumstances set forth in the conference agreement . . . The conferees also intend that the phrase 'unreasonably discriminate among providers of functionally equivalent services' will provide localities with the flexibility to treat facilities that create different visual, aesthetic, or safety concerns differently to the extent permitted under generally acceptable zoning requirements . . . It is not the intent of this provision to give preferential treatment to the personal wireless service industry in the processing of requests . . .[27]

Congress's intent in prohibiting the Commission from establishing or increasing restrictions on the authority of local governments to regulate wireless telecommunications and broadband facilities is clear. The Commission does not have the authority to impose additional restrictions in this area of regulation.

C. No Additional FCC Rulemaking is Necessary Because the TCA Regulations Related to Local Governmental Authority are Unambiguous

Although the Commission requests guidance concerning whether it could "adopt rules further defining when a state or local legal requirement constitutes an effective barrier to the

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[25] *Town of Clarkstown*, 603 F.Supp.2d at 725 (quoting *Omnipoint Commc'ns, Inc. v. City of White Plains* (2nd Cir. 2005) 430 F.3d 529, 531); *see also Voice Stream PCS I, LLC v. City of Hillsboro* (D. Or. 2004) 301 F.Supp.2d 1251, 1255 ("But despite Congress's intention to advance competition among wireless providers, Congress also acknowledged there are legitimate state and local concerns involved in regulating the siting of such facilities . . . such as aesthetic values and the costs associated with the use and maintenance of public rights-of-way").

[26] H.R. Conf. Rep. No. 104-458 (1996), at 209; *see also Town of Clarkstown*, 603 F.Supp.2d at 727 (denying FCC preemption regarding placement and installation of wireless facilities).

[27] S.R. Conf. Rep. No. 104-230 (1996), at 185.

provision of telecommunications service under section 253(a),"[28] this misstates the regulation. Section 253(a) states that no local government "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." This does not grant the Commission the authority to regulate local regulations that "constitute an effective barrier," as that interpretation of Section 253(a) has been rejected by most courts (and the Commission) as inconsistent with the language and intent of the TCA.[29]

Courts that have considered the definition of "prohibition" in terms of Section 253(a) and 332 have consistently used the same definition. A city "prohibits" wireless telecommunications and broadband facilities when it bans them or establishes policies that have the effect of banning them.[30] A wireless service provider can establish that local regulations have the effect of prohibiting service if it can show that there is a "significant gap" in its coverage and that "reasonable efforts are so likely to be fruitless that it is a waste of time even to try."[31] "Prohibit" is generally defined as "to forbid by authority."[32]

The meaning of Sections 253(a) and 332 are already clear. Local governments are not allowed to completely ban wireless telecommunications facilities (or individual service providers) or enact regulations that make it impossible for a wireless service provider or infrastructure developer to obtain a permit. It is axiomatic that if a city *permits* some wireless facilities, subject to its land use restrictions, it does not *prohibit* such uses. While Section 253 allows the Commission to preempt local regulations that prohibit telecommunications facilities, there is no language in the statute, legislative history, or case law that grants the Commission

[28] NOI, at ¶ 57.
[29] *See, e.g., Sprint Telephony PCS, L.P. v. County of San Diego* (9th Cir. 2008) 543 F.3d 571, 578.
[30] *Virginia Metronet*, 984 F.Supp. at 971.
[31] *City of Hillsboro*, 301 F.Supp.2d at 1261.
[32] Merriam-Webster Online Dictionary (2011).

authority to eliminate or modify local regulations that make it difficult, time consuming or expensive for wireless telecommunications companies to obtain a permit.

As described above, all of the Cities currently allow wireless telecommunications and broadband facilities and permitted numerous such facilities in their respective jurisdictions. If the Commission modifies the definition of "prohibit" to include, for example, situations where wireless and broadband service is not optimal or does not meet the needs of high-speed broadband requirements, it may result in several unintended consequences. For example, Cities may be required to hire their own experts to determine whether the existing wireless service meets the data and broadband needs of a particular service provider based on its technological demands. While service gaps can be tested by cities through drive tests, publicly available service maps, and public testimony from residents, the technical requirements of a particular data network would need to be confirmed by an expert which could lead to a "battle of experts" in certain jurisdictions. This would increase both the cost of the application and the time necessary for cities to process applications.

D. The Broadband Data Improvement Act Does Not Grant the Commission Authority to Impose Additional Restrictions on Local Agencies

As noted by the Commission, the Broadband Data Improvement Act grants the Commission authority to "remove barriers to infrastructure development" of broadband facilities. The Act does not explicitly or implicitly authorize the Commission to impose additional restrictions on local governmental authority to regulate such facilities. To the contrary, the legislative history shows that "a national broadband policy should support and assist State efforts to work cooperatively at a local level in identifying areas where deployment of broadband may be lagging and in tailoring solutions to meet the needs of local communities."[33] The Cities

[33] S. Rep. 1110-204 (2007), at 1171.

completely support this goal. It is mutually beneficial for broadband providers and local governments to have communities with access to high quality wireless telecommunications and broadband services. However, local governments must retain authority over the time, place and manner in which such facilities and services are provided within their jurisdictions.

V. THE FCC CAN PROVIDE GUIDELINES THAT IMPROVE LOCAL REGULATION OF WIRELESS FACILITIES AND INCREASE UNIFORMITY

While the Cities oppose any attempt by the Commission to impose additional restrictions on local regulation of wireless and broadband facilities, they welcome additional guidance from the Commission regarding the "best practices" of municipalities that further the TCA's goal of balancing the needs of wireless and broadband service providers and maintaining substantial local control over the siting of towers and facilities. Toward this objective, the Cities provide the following recommendations.

A. Collocation

As noted by the Commission, "collocating additional antennas have been, and will continue to be, integral to wireless build-out.[34] The Cities strongly support policies and guidelines which favor facility collocation. Integrating facilities within the existing right-of-way infrastructure reduces potential aesthetic impacts and view impacts to the surrounding community. Further, provided that the collocation does not significantly expand or increase the size of the existing facility or structure, it minimizes the potential that the facility will create a traffic hazard for motorists. When multiple providers serve a particular area, collocation prevents the unchecked proliferation of wireless and broadband facilities as multiple service providers would otherwise exponentially increase the number of facilities in the particular jurisdiction. Several Cities, including Chino Hills, Diamond Bar, El Segundo, Hermosa Beach,

[34] NOI, at ¶ 3 n.3.

Malibu, Palos Verdes Estates, Rolling Hills, Santa Paula, and West Hollywood, include regulations which encourage collocation of facilities when feasible. The Commission should establish guidelines which facilitate and encourage collocation of facilities.

B. Greater Transparency

The Commission asked for guidance regarding "adjustments that could be made to ensure that localities obtain necessary information and addressing legitimate concerns."[35] Some Cities are frustrated by a lack of transparency on the part of some wireless and broadband service providers and infrastructure developers. Despite multiple requests, some Cities are denied access to plans showing all existing and planned facilities in the region. These plans are an essential tool to ensure that cities allow high quality wireless and broadband service while locating the required facilities in a location which minimizes impacts to the local community. Further, plans showing existing and planned facilities can lead to greater regional integration of wireless and broadband networks. A city's ability to review where facilities are planned allows them to work with service providers, infrastructure developers and neighboring jurisdictions to ensure that regional gaps in coverage and low service quality can be remedied and that cities can find the optimal location for such facilities, even if that location may be in a different jurisdiction. This would also facilitate coordination between cities to seek collocation opportunities.

Requiring submission of a regional telecommunications plan would also provide greater flexibility for service and infrastructure providers in the application process. It would permit applicants to submit applications for several DAS antennas in a DAS network to be submitted in a single application, thereby eliminating piecemeal review by cities and permitting a more efficient and effective holistic review of regional telecommunications service and facilities. Accordingly, the Commission should include a requirement that service and infrastructure

[35] NOI, at ¶ 29.

providers prepare plans showing existing and planned facilities within a particular region and share that information with the appropriate regional and local agencies authorized to approve telecommunications facilities.

C. DAS Networks

The Commission also seeks comments on any challenges that may apply to the deployment of microcells, picocells, femtocells, and DAS.[36] Generally, the Cities support DAS networks, in that they provide targeted improvements to existing telecommunications and broadband networks while reducing the potential aesthetic, land use, and safety impacts associated with larger facilities. However, local regulation of DAS networks is essential to avoid an over-proliferation of DAS facilities throughout a particular jurisdiction. While DAS networks may mitigate aesthetic and view impacts when compared to larger facilities, if left unregulated they create the potential for visually cluttered public right-of-ways, which may result in traffic safety issues if the facilities reduce visibility to corners, intersections, street signs and other public improvements within the public right-of-way. Consequently, any regulations or guidelines established by the Commission should encourage the installation and use of DAS networks while retaining local authority to regulate and approve their placement within a particular jurisdiction.

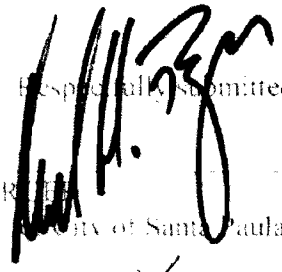
VI. CONCLUSION

The Cities greatly appreciate the Commission's invitation to comment on this important topic. The Cities respectfully request that the Commission develop guidelines and "best practices" of municipalities, service providers and infrastructure developers to provide guidance as to how local governments could improve regulation of wireless facilities. However, the Commission lacks legal authority to impose additional *regulations* to restrict the authority of

[36] NOI, at ¶ 24.

local governments to review and approve wireless facility applications. The Commission should not adopt additional regulations which have such effect

Respectfully submitted,



KARL H. BERGER
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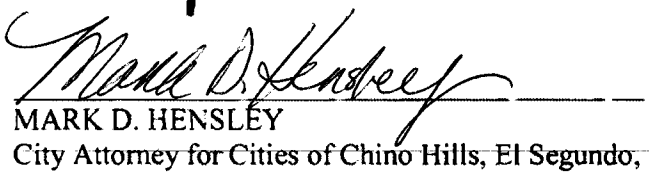

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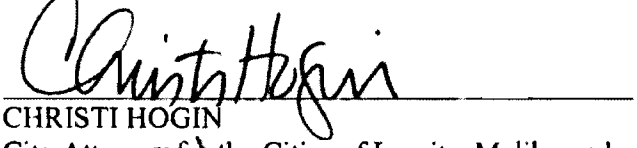

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September 28, 2011

CITY OF PALOS VERDES ESTATES RESPONSE TO COMMENTS OF NEXTG NETWORKS, INC.

Independent of the foregoing Comment submitted on behalf of all of the Cities, in which the City of Palos Verdes Estates ("City") joins, the City would like to respond separately to comments submitted on July 18, 2011 by NextG Networks, Inc. ("NextG"). The City is significantly concerned regarding certain representations made by NextG regarding its consideration of a wireless telecommunications facility application earlier this year.

I. BACKGROUND

NextG submitted a proposal for a new DAS facility, which would be placed on a new 27 foot high steel pole with an antenna, within the City's public right-of-way. Before Planning Commission review, the City's wireless telecommunications consultant reviewed the application. He made several conclusions including that (1) based on service provider service maps and drive tests, there was not a significant gap in coverage; (2) the facility could be constructed in a less aesthetically impactful manner (e.g., integrating the facility into existing infrastructure in the public right-of-way or placing the antennae on top of a street sign); and (3) the proposed facility created both view and aesthetic impacts and was particularly visible to drivers given its height. While there was not a "significant gap" in coverage, NextG stated that the proposed facility was needed to improve the strength of Verizon's signal to accommodate high speed data and new product offerings. NextG stated that it was not technologically feasible to integrate the proposed facility into existing street signs or infrastructure.

The Planning Commission reviewed the application on February 15 and March 15, 2011. In response to Commission comments, NextG made certain changes, including reducing the pole height to approximately 13 feet. The Planning Commission voted unanimously to deny the application, noting that there were no above-ground facilities in the area, the public right-of-way